

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On September 30, 1987 appellant, then a 28-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained left carpal tunnel syndrome causally related to factors of his federal employment. OWCP accepted the claim for left carpal tunnel syndrome. Appellant stopped work on October 9, 1987.

On July 6, 1988 the employing establishment offered appellant a position as a modified custodian. The position required intermittent standing and walking, lifting no more than 10 pounds, and occasional reaching above the shoulder level. The duties of the position included cleaning tables and chairs in the lunchroom and spot sweeping bathroom floors.

On November 16, 1988 Dr. James D. Schlenker, a Board-certified surgeon, found that appellant could return to the described duties full time effective October 31, 1988. Appellant returned to work on November 4, 1988 as a modified custodian.⁴

On March 1, 1989 the employing establishment denied appellant's request for reassignment to a different work schedule.

Appellant stopped work on March 16, 1989 and informed the employing establishment that he would not return unless he was placed back on his original tour schedule and preferably in his craft. On September 14, 1989 the employing establishment removed him from employment effective June 9, 1989 for unauthorized absence since March 1989.

³ Docket No. 90-321 (issued April 5, 1990); *Order Dismissing Appeal*, Docket No. 95-82 (issued July 11, 1995); Docket No. 97-670 (issued March 10, 1999), *petition for recon. denied*, Docket No. 97-670 (issued August 19, 1999); *Order Dismissing Appeal*, Docket No. 00-2532 (issued January 31, 2001); *Order Dismissing Appeal*, Docket No. 02-1467 (issued January 22, 2002); Docket No. 02-1032 (issued October 22, 2002); *Order Remanding Case*, Docket No. 02-1209 (issued October 28, 2002); *Order Dismissing Appeal*, Docket No. 02-1143 (issued April 13, 2002); *Order Granting Petition for Reconsideration*, Docket No. 02-1467 (issued December 16, 2002); *Order Dismissing Appeal*, Docket No. 02-1467 (issued January 23, 2003); Docket No. 04-0757 (issued May 2, 2005); *Order Dismissing Appeal*, Docket No. 06-457 (issued March 21, 2006); *Order Dismissing Appeal*, Docket No. 07-68 (issued January 29, 2007); *Order Dismissing Appeal*, Docket No. 07-1774 (issued May 21, 2008); Docket No. 09-151 (issued October 21, 2009), *petition for recon. denied*, Docket No. 09-151 (issued April 13, 2010); *Order Dismissing Appeal*, Docket No. 11-0007 (issued June 11, 2011); Docket No. 10-2320 (issued July 19, 2011), *petition for recon. denied*, Docket No. 10-2320 (issued January 25, 2012); Docket No. 12-714 (issued July 25, 2012); *Order Dismissing Appeal*, Docket No. 12-1967 (issued March 1, 2013); *Order Remanding Case*, Docket No. 13-1383 (issued December 16, 2013); Docket No. 14-759 (issued July 1, 2014); Docket No. 15-426 (issued April 20, 2015); Docket No. 16-0270 (issued April 26, 2016); *Order Dismissing Appeal*, Docket No. 17-0761 (issued June 20, 2017); Docket No. 18-0075 (issued April 11, 2018); *Order Dismissing Appeal*, Docket No. 18-1245 (issued November 9, 2018); *Order Dismissing Appeal*, Docket No. 19-1254 (issued June 25, 2019); Docket No. 19-1961 (issued January 28, 2021).

⁴ By decision dated August 9, 1989, OWCP granted appellant a schedule award for seven percent permanent impairment of the left upper extremity. By decision dated April 5, 1990, the Board affirmed the August 9, 1989 decision. Docket No. 90-321 (issued April 5, 1990).

On February 17, 1991 Dr. Timothy Norton, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), found that appellant could perform the modified position as set forth but that additional duties like washing sinks and toilets would require too much repetitive movement. On May 2, 1991 the employing establishment advised that it had not assigned him additional duties but only the duties provided in the July 6, 1988 offered position. It asserted that appellant had stopped work because he did not like his shift hours.

By decision dated July 6, 1992, OWCP denied appellant's claim for wage-loss compensation commencing March 16, 1989. It found that the employing establishment had provided him with work within his restrictions and that he stopped work for reasons unrelated to his employment injury.

By decisions dated August 15, 1994 and October 27, 1995, OWCP denied modification of its finding that appellant had not established disability commencing March 16, 1989.⁵

In a statement dated May 13, 1996, J.W., a manager with the employing establishment, advised that appellant had resumed modified employment on November 6, 1988 but had stopped work on March 16, 1989 and requested that he be placed back on his original duty tour and original craft. He noted that appellant was now contending that he stopped work due to his medical condition. J.W. asserted that appellant was not entitled to compensation based on his refusal or neglect of suitable employment.

By decision dated August 10, 1996, OWCP modified the October 27, 1995 decision to find that appellant had performed duties not specifically approved by his physician. It noted, however, that there was no evidence supporting that these duties exceeded the restrictions set forth by Dr. Schlenker. OWCP found that the medical evidence of record failed to establish that appellant was disabled from his modified employment beginning March 16, 1989. Appellant requested reconsideration. By decision dated November 13, 1996, OWCP denied his request for reconsideration as he had not raised an argument or submitted evidence sufficient to warrant reopening his case for further merit review under 5 U.S.C. § 8128(a).

By decision dated March 10, 1999, the Board affirmed the August 10 and November 13, 1996 OWCP decisions.⁶ The Board determined that appellant had not established that he worked outside of his restrictions. The Board further found that the medical evidence of record failed to show that he was disabled from his limited-duty position commencing March 16, 1989.

By decision dated October 22, 2002, the Board affirmed March 14 and November 29, 2001 and March 5, 2002 OWCP decisions denying appellant's requests to reopen his case for further merit review pursuant to 5 U.S.C. § 8128(a).⁷ By decisions dated May 2, 2005, October 21, 2009, July 19, 2011, and July 25, 2012, the Board affirmed OWCP decisions denying his requests for reconsideration on the grounds they were not timely filed and failed to demonstrate clear evidence

⁵ Appellant appealed the August 15, 1994 decision to the Board but subsequently requested dismissal of the appeal. *Order Dismissing Appeal*, Docket No. 95-82 (issued July 11, 1995).

⁶ Docket No. 97-670 (issued March 10, 1999).

⁷ Docket No. 02-1032 (issued October 22, 2002).

of error.⁸ In an order dated December 16, 2013, the Board set aside a May 10, 2013 nonmerit decision denying appellant's request for reconsideration under section 8128(a) and remanded the case for OWCP to apply the standard for untimely requests for reconsiderations.⁹ On July 1, 2014 and April 20, 2015 the Board affirmed OWCP nonmerit decisions finding that his requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error.¹⁰

By decision dated April 26, 2016, the Board affirmed a November 16, 2015 OWCP nonmerit decision that again denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.¹¹ The Board reviewed his contention that OWCP erred in failing to consider that the employing establishment withdrew his limited-duty position, noting that it had previously addressed this argument and that it was thus *res judicata*.¹²

By decision dated April 11, 2018, the Board affirmed a September 29, 2017 OWCP decision denying appellant's request for reconsideration as was untimely filed and failed to demonstrate clear evidence of error.¹³

On May 17, 2018 appellant again requested reconsideration. He argued that OWCP should have referred him for a work capacity evaluation. Appellant also maintained that the August 10, 1996 decision indicated that he performed duties not approved by his physician.

By decision dated May 23, 2018, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.¹⁴

On September 20, 2018 appellant requested reconsideration. He contended that OWCP had withheld evidence from Dr. Schlenker, noting that it had provided questions and a statement of accepted facts (SOAF) to the DMA but not to his physician.

⁸ Docket No. 04-757 (issued May 2, 2005); Docket No. 09-151 (issued October 21, 2009); Docket No. 10-2320 (issued July 19, 2011), *petition for recon. denied*, Docket No. 10-2320 (issued January 25, 2012); Docket No. 12-714 (issued July 25, 2012). On March 1, 2013 the Board dismissed appellant's appeal of an information letter. *Order Dismissing Appeal*, Docket No. 12-1967 (issued March 1, 2013).

⁹ *Order Remanding Case*, Docket No. 13-1383 (issued December 16, 2013).

¹⁰ Docket No. 14-0759 (issued July 1, 2014); Docket No. 15-0426 (issued April 20, 2015), *petition for recon. denied*, Docket No. 15-0426 (issued October 27, 2015).

¹¹ Docket No. 16-0270 (issued April 26, 2016).

¹² On February 21, 2017 appellant sought an appeal before the Board from a purported December 19, 2016 decision. In an order dated June 20, 2017, the Board dismissed his appeal as there was no adverse decision over which it had jurisdiction. *Order Dismissing Appeal*, Docket No. 17-0761 (issued June 20, 2017).

¹³ Docket No. 18-0075 (issued April 11, 2018).

¹⁴ Appellant appealed the May 23, 2018 decision to the Board; however, he subsequently requested that the appeal be dismissed. *Order Dismissing Appeal*, Docket No. 18-1245 (issued November 9, 2018).

By decision dated April 29, 2019, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.¹⁵

Appellant, on August 29, 2019, again requested reconsideration. In support of his claim, he submitted an August 14, 2019 report from Dr. Salman Chaudri, an osteopath.

By decision dated September 9, 2019, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

Appellant appealed to the Board. By decision dated January 28, 2021, the Board affirmed OWCP's April 29 and September 29, 2019 decisions, finding that the requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error.¹⁶

On March 12, 2021 appellant requested reconsideration. He contended that OWCP erred in failing to provide him with evidence submitted by the employing establishment prior to the August 10, 1996 decision, specifically a statement dated May 13, 1996. Appellant noted that OWCP had provided the employing establishment with the evidence that he had submitted, as demonstrated by a June 27, 1996 letter from OWCP advising the employing establishment that it was providing evidence from appellant and requesting a response. He noted that he had met in person with an OWCP claims examiner on August 9, 1996 but had not received a copy of the factual evidence submitted by the employing establishment. Appellant also asserted that OWCP had not discussed the May 13, 1996 statement in its August 10, 1996 decision. He noted that the statement indicated that he was not entitled to compensation as he had refused suitable work under 5 U.S.C. § 8106(c)(2). Appellant asserted that OWCP indicated in its August 10, 1996 decision that he had abandoned an available limited-duty position and thus was not entitled to compensation. He argued that OWCP's failure to include the May 13, 1996 statement deprived him of his right to respond. Appellant maintained that OWCP erred in its August 10, 1996 decision when it modified the July 6, 1992 decision to find that he had abandoned limited-duty employment without citing the appropriate statutes and regulations.

In support of his claim, appellant resubmitted the May 13, 1996 statement from the employing establishment. He further submitted an August 9, 1996 statement to OWCP. Appellant indicated that he had met with an OWCP claims examiner on August 9, 1996 who told him that a decision would be made on his claim by the following week. He asserted that he believed that OWCP was trying to find a way to deny his claim. Appellant requested that, if his claim was denied, he be advised of the defects in his claim and instructions for submitting evidence in accordance with OWCP procedures.

By decision dated July 28, 2021, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

¹⁵ Appellant appealed the April 29, 2019 decision to the Board; however, he subsequently requested that the appeal be dismissed. *Order Dismissing Appeal*, Docket No. 19-1254 (issued June 25, 2019).

¹⁶ Docket No. 19-1961 (issued January 28, 2021).

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.¹⁷ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁸ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).¹⁹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.²⁰

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.²¹ OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.²² In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.²³

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.²⁴ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.²⁵

¹⁷ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

¹⁸ 20 C.F.R. § 10.607(a).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

²⁰ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

²¹ See 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

²² *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); *supra* note 19 at Chapter 2.1602.5 (September 2020).

²³ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

²⁴ *S.C.*, Docket No. 18-0126 (issued May 14, 2016).

²⁵ *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrates that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²⁶ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²⁷

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations²⁸ and procedures²⁹ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.³⁰ The most recent merit decision was the Board's March 10, 1999 decision. As appellant's March 12, 2021 request for reconsideration was received more than one year after the March 10, 1999 decision, the Board finds that it was untimely filed. Therefore, he must demonstrate clear evidence of error by OWCP in denying his claim for wage-loss compensation beginning March 16, 1989.³¹

The Board further finds that appellant has not demonstrated clear evidence of error.

In his March 12, 2021 request for reconsideration, appellant contended that OWCP had failed to provide him with the employing establishment's May 13, 1996 statement prior to issuing its August 10, 1996 decision.

Appellant further asserted that OWCP, in its August 10, 1996 decision, failed to discuss the May 13, 1996 statement from the employing establishment. He noted that the employing establishment had asserted that he was not entitled to wage-loss compensation as he had refused suitable work under 5 U.S.C. § 8106(c)(2) and that, in its August 10, 1996 decision, OWCP found that he had abandoned an available limited-duty position without citing the appropriate law and regulations. Appellant contended that OWCP erred in its August 10, 1996 decision in modifying

²⁶ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 19 at Chapter 2.1602.5(a) (September 2020).

²⁷ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²⁸ 20 C.F.R. § 10.607(a); *see J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

²⁹ *Supra* note 19 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

³⁰ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

³¹ *Id.* at § 10.607(b); *see M.W.*, Docket No. 17-0892 (issued May 21, 2018); *see S.M.*, Docket No. 16-0270 (issued April 26, 2016).

its July 6, 1992 decision and finding that he had abandoned limited-duty employment. As noted, however, the Board has affirmed OWCP's August 10, 1996 decision, which addressed these contentions. Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP.³²

Appellant further submitted a statement dated August 9, 1996 in which he indicated that an OWCP claims examiner had told him that a decision would be issued on his claim by the next week. He requested that if his claim was being denied he was provided with enough information to understand the defects of his claim. Appellant's August 9, 1996 statement, however, is not relevant to the underlying issue of whether he has demonstrated that OWCP erred in finding that he had not established disability from his limited-duty employment beginning March 16, 1989. The submission of evidence or argument that is not pertinent to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.³³

Appellant therefore has not raised a substantial question as to the correctness of OWCP's decision or submitted any supporting medical evidence. Consequently, OWCP properly found that his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

³² See *M.W.*, Docket No. 21-0925 (issued November 10, 2021); *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

³³ See *M.H.*, Docket No. 21-0399 (issued September 20, 2021); *D.B.*, Docket No. 20-0466 (issued December 17, 2020); *Leona N. Travis*, 43 ECAB 227 (1991).

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board